

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

PEDRO GARCIA,)
Plaintiff,)
)
v.) CIVIL ACTION NO: 2:09cv262
)
M. JOHN BERRY, Director,)
United States Office of Personnel Management,)
)
and)
)
UNITED STATES OFFICE OF PERSONNEL)
MANAGEMENT,)
Defendants.)

FEDERAL DEFENDANTS'
MOTION TO DISMISS COUNT I FOR FAILURE TO PROSECUTE, OR IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT ON COUNT I

COMES NOW the defendants, by counsel, and move to dismiss Count I of the complaint for the following reasons:

1. Pursuant to Fed. R. Civ. P. 41(b), because plaintiff has failed to appropriately prosecute this claim in accordance with this Court's *Joint Rule 16(b) Scheduling Order*, filed August 12, 2009;
2. Pursuant to Fed. R. Civ. P. 56, because plaintiff has failed, under the highly deferential standard of review dictated by 5 U.S.C. § 7703(c), to establish error by the Merit Systems Protection Board when it upheld the agency's removal of plaintiff for unacceptable performance.

Respectfully submitted,

M. JOHN BERRY, Director
United States Office of Personnel Management

UNITED STATES OFFICE OF PERSONNEL

MANAGEMENT
Defendants

NEIL H. MACBRIDE
United States Attorney

By: //s//
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CERTIFICATE OF SERVICE

I hereby certify that, on the 8th day of October, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of electronic filing (NEF) to the following filing user(s):

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